INDEX.

	Page
Opinion Below	1
Question Presented	2
Statutes Involved	2
Statement	2
Argument	3
(1) Only Possible Question is Whether Widow Was a Beneficiary Within the Meaning of the Statute	3
(2) This Court in Reinecke v. Smith has Settled the Definition of "Beneficiaries" as Used in the Statute	4
Conclusion	5

CITATIONS.

Atkins v. Commissioner, 63 Fed. (2d) 88	4
Butterworth v. Commissioner, 63 Fed. (2d) 944	4
Fidelity-Philadelphia Trust Co. v. Commissioner, 63 Fed. (2d) 949	4
Pampanga Mills v. Trinidad, 279 U. S. 211	5
Pardee v. Commissioner, 63 Fed. (2d) 948	4
Reinecke v. Smith, 53 Sup. Ct. 570	4, 5
San Pedro, Los Angeles & St. L. R. Co. v. U. S., 247 U. S. 307, 309	6
United States v. Bolster, 26 Fed. (2d) 760	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 979.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

TITLE GUARANTEE LOAN AND TRUST COMPANY, as Trustee of the Estate of J. H. Woodward, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the court below (R. 66) is reported in 63 Fed. (2d) 621.

The judgment sought to be reviewed was entered February 17, 1933 (R. 68-69). The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether a testamentary trustee is entitled to deduct, in computing the net income of the trust, amounts which are distributed to the testator's widow who accepted the provisions of the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED.

The material statutory provisions, enacted in the Revenue Act of 1924, re-enacted in identical form in the Revenue Act of 1926, and re-enacted without material change in substance in the Revenue Act of 1928, are set forth in the appendix to the petition for writ of certiorari.

STATEMENT.

The facts found by the Board of Tax Appeals (R. 42-49) may be summarized as follows:

The respondent is trustee under the will of J. H. Woodward, who died a resident of Alabama on December 15, 1917. The will provided that the residuary estate should be held in trust by respondent and the net income therefrom, after payment of a small monthly annuity to a named beneficiary, should be paid as and when received to the decedent's widow and his three children or their survivors in equal shares. The testamentary provision referred to was in terms as follows:

> "I direct the trustee to pay over from the net income from the trust estate, the sum of Twenty-five ($25.00) Dollars per month to Marion Wallace during the life of Marion Wallace. All the rest and residue of the net income from the trust estate, I direct the trustee to pay over as and when received share and share alike, to my wife, Martha Woodward, my son Allan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the survivors of them * * *."

The will provided for the disposition of the corpus of the trust after the death of the surviving life tenant. The widow elected to accept the provision made for her by the will.

The net income was distributed currently to the widow and three children in accordance with the terms of the will. The income thus distributed to the widow during and prior to the taxable years was less than the value of her statutory interest in the decedent's estate. In her tax returns from 1919 to 1927 the widow reported amounts thus distributed to her and paid income taxes thereon. Subsequent to the decision of the Circuit Court of Appeals for the First Circuit in *United States v. Bolster*, 26 Fed. (2d) 760, and after the death of the widow, the Commissioner refunded to the executor of the widow the taxes thus paid, with interest.

In its returns of the income of the trust estate, the respondent deducted the amounts distributed to the widow. The Commissioner on February 26, 1929, disallowed these deductions for the years 1924 to 1927, inclusive, and on October 15, 1930, disallowed the 1928 deduction, and determined deficiencies accordingly. The Board of Tax Appeals approved the action of the Commissioner. This decision was reversed by the Court below.

ARGUMENT.

1. *The only possible question is whether the widow was a beneficiary within the meaning of the statute.*

The petitioner asserts three errors, the third a general specification.

The first specification asserts that the Circuit Court of Appeals erred in holding that the distributions to the widow were distributions of income as income, rather than returns of capital. The Court below did express its view that the widow, not the trustee, was taxable. However, the

trustee's fiduciary returns are before the Court in this case, not the widow's returns, and it is respectfully submitted that this question is not cognizable in this case.

The second specification, to the effect that the Circuit Court of Appeals erred in deciding that the amounts distributed by the trustee to the widow were deductible by the trustee, goes to the heart of the question determined below, and is the only question which may exist in this case.

Obviously, if the widow was a beneficiary, the statute *requires* that amounts distributed to her from the income of the trust be allowed as deductions in computing the net income of the trust.

The Board of Tax Appeals held that she was not a beneficiary, and the First Circuit adopted the same view in the case of *Atkins v. Commissioner*, 63 Fed. (2d) 88, involving similar facts. The Fifth Circuit in the instant case and the Third Circuit in the cases of *Julia Butterworth v. Commissioner*, 63 Fed. (2d) 944, *Frank Pardee v. Commissioner*, 63 Fed. (2d) 948, and *Fidelity-Philadelphia Trust Co. v. Commissioner*, 63 Fed. (2d) 949, held that under such circumstances the widow is a beneficiary as that term is used in the statute.

That the widow stood in the relation of *cestui que trust* to the property held in trust by respondent has never been questioned, the petitioner's argument being that all *cestuis que trustent* are not beneficiaries of the trust.

2. *This Court in Reinecke v. Smith has settled the definition of "beneficiaries" as used in the statute.*

In the case of *Reinecke v. Smith*, 53 Sup. Ct. 570 (decided April 10, 1933, after the decisions were made in all of these cases in the First, Third and Fifth Circuit), it was argued by the respondent that the term "beneficiary", as used in subdivision (g) of Section 219 of the Revenue Act of 1924, included the trustee. Subdivision (d) of

the same section is before the Court in the instant case. There is nothing in the statute to indicate that Congress intended to use the term in different senses in these two subdivisions, but on the contrary, they both have to do with the taxation of "the income of estates or of any kind of property held in trust" (see subdivision (a) of the same section). It must be presumed therefore, that the term is used in the same sense in both subdivisions. *Pampanga Mills v. Trinidad*, 279 U. S. 211.

In the *Reinecke* case, the argument that the trustee was a beneficiary was rejected by this Court in the following language:

> "The unambiguous phraseology of the Act precludes the suggested construction. A trustee is not subsumed under the designation beneficiary. Both words have a common and accepted meaning; the former signifies the person who holds title to the *res* and administers it for the benefit of others; the latter the *cestui que trust* who enjoys the advantages of such administration. The ordinary meaning of the terms used, which we are bound to adopt (Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 560, 76 L. ed. 484, 489, 52 S. Ct. 211), and the view held by those charged with the enforcement of the Act, ratified by reenactment of the section, alike forbid the adoption of the construction for which the respondents contend."

This language is a clear denial of petitioner's argument that the word beneficiary, as used in the statute here under consideration, is not the equivalent of *cestui que trust*.

CONCLUSION.

The conflict of the decision below and its companion cases in the Fifth Circuit with the decision of the First Circuit in *Atkins v. Commissioner, supra*, has been settled by this Court's decision in *Reinecke v. Smith, supra*. All occasion for granting the writ of certiorari herein has been removed

by the *Reinecke* decision, and we ask the Court to deny the petition on that ground. See *San Pedro, Los Angeles & Salt Lake Railroad Company v. United States*, 247 U. S. 307, 309.

Respectfully submitted,

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